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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 76

KLOR'S INC., PETITIONER

v.

BROADWAY-HALE STORES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Petitioner operates a retail store on Mission Street in San Francisco, California (R. 5).[1] Respondents are Broadway-Hale Store, Inc., which also operates a retail store on Mission Street; ten manufacturers of certain products (radios, TV sets, phonographs, refrigerators, stoves, clothes washers and driers); and ten distributors of these manufacturers (R. 5-8).

The complaint filed by petitioner charged that respondents have conspired to restrain and monopolize commerce in the products sold by the 20 named manufacturer and distributor defendants, in violation of

[1] "R" refers to the transcript of record. The court of appeals' opinion is reprinted as Appendix A to the petition and is cited herein as "App. A."

Sections 1 and 2 of the Sherman Act. It alleged that the manufacturer-distributor defendants have discriminated against petitioner in favor of respondent Hale by selling to Hale at substantially lower prices, by furnishing to it services and allowances not equally accorded petitioner, and by refusing to sell their products to petitioner (R. 9-11). It further alleged that Hale, as the operator of "a chain of key stores" in the Pacific Coast area (R. 11), has used its monopolistic buying power to obtain from the other respondents preferential terms and conditions, and to purchase from them upon the condition that they not sell their products to petitioner (R. 11-12).[2]

The defendants moved for summary judgment, submitting uncontested affidavits showing that (1) a large number of competing brands not covered by the charges of the complaint are sold in San Francisco, and (2) that many San Francisco retailers, including numerous retail stores on Mission Street within five or six blocks of petitioner's store, sell the brands covered by the complaint's charges (R. 122-125, 128-9). The district court granted the motion on the ground that the complaint failed to state a cause of action under the Sherman Act (R. 133-4).

The court of appeals, relying primarily upon *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, affirmed (App. A). It held that the Sherman Act's prohibition of "unreasonable" restraints of trade requires a showing that the public is or may be injured by the restraint, and that, on the facts standing admitted, actual or potential

[2] The allegations as to discrimination are also reflected in counts under the Robinson-Patman Act, but these counts were severed from the Sherman Act count and are therefore not involved here (App. A 6-7).

prejudice to the public was negatived (App. A 13-32). The court stated that concerted conduct "directed at harming the opportunity of a single trader to compete" (App. A 24) is not an unreasonable, prohibited restraint if, notwithstanding such restraint, the market is subject to strong competitive forces and defendants have neither sought nor obtained power to exercise market control (App. A 24-32).

DISCUSSION

The Government believes the decision below is in conflict with decisions of this Court, and that the petition presents a question of substantial public importance, namely, whether proof of injury to the consuming public in terms of actual or intended market control or substantial effect on the market is essential to establish a Sherman Act violation. In our view, the Act *does* protect "the opportunity of a single trader to compete," and destruction of that opportunity is a public injury under the Sherman Act's standard of right and wrong, irrespective of whether the public can freely buy elsewhere.

Except for those restraints which are deemed *per se* illegal, this Court has not undertaken to articulate a precise test for determining whether a particular restraint is unreasonable. Rather, it has stressed the necessity for considering the various relevant factors in the particular case, such as the nature and history of the restraint, the actual or probable extent of the anti-competitive effect, and the reason for adopting the restraint. See, e.g., *Board of Trade of the City of Chicago* v. *United States*, 246 U.S. 231; *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527; *Sugar Institute, Inc.* v. *United States*, 297 U.S. 553, 600. The

court below has rejected this flexible approach. Its decision elevates the factor of injury to the "consuming public" to a position of controlling importance. Thus, it deems necessary a showing that the defendants have market control or have caused "substantial" interference with the "consuming public" (App. A. 31).[3]

In contrast, this Court, holding irrelevant "the importance of the interstate commerce affected in relation to the entire amount of that type of commerce in the United States," has stated that the Sherman Act "is designed to sweep away all appreciable obstructions so that the statutory policy of free trade might be effectively achieved." *United States* v. *Yellow Cab Co.*, 332 U.S. 218, 226. Under the lower court's interpretation, many clear violations of the basic statutory policy of "free trade" would be permitted to flourish. For example, a conspiracy involving an appreciable amount of interstate commerce,[4] having no "legitimate business aims" (*Times-Picayune* v. *United States*, 345 U.S. 594, 622-23), and designed solely to eliminate a competitor, can hardly be deemed a reasonable restraint (see *infra*, pp. 6-7). Yet the lower court would not strike down such a restraint if a large number of other competitors existed to whom the consuming public could turn.

This Court, without examining the strength of the remaining competition, has held that a restraint adversely affecting "the liberty of a trader to engage in

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[3] *Apex Hosiery*, which was concerned with the applicability of the Sherman Act to a labor union's strike activities, does not furnish support for the broad proposition enunciated by the lower court. Cf. *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457, 466-467; *Allen Bradley Co.* v. *Local Union No. 3*, 325 U.S. 797, 806.

[4] In the instant case, there is no question but that the commerce requirement has been met (App. A 13).

business" is within the prohibitions of the Sherman Act. *Binderup* v. *Pathe Exchange*, 263 U.S. 291, 312; *Loewe* v. *Lawlor*, 208 U.S. 274, 293; cf. *Radovich* v. *National Football League*, 352 U.S. 445, 453-454;[5] *United States* v. *National Retail Lumber Dealers Assn.*, 40 F. Supp. 448, 458 (D. Colo.). The authorities thus establish that the policy of the Act is broad enough to protect the basic right of the individual entrepreneur to go into business and to stay in business free of coercive restraint by competitors or suppliers. Were it otherwise, those bent on restrictive trade policies would be enabled to pursue those policies at large by making a few conspicuous examples of individual traders failing to conform to their wishes.[6]

The unsoundness of the decision below is pointed up by consideration of the categories of *per se* violations. If petitioner's store had been the object of a price-fixing conspiracy or a tying arrangement, the restraint would be deemed *per se* unlawful. See *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5; *United States*

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[5] In *Radovich*, this Court rejected the holding of the Court of Appeals for the Ninth Circuit that the plaintiff in a private treble damage suit must allege and prove that the violation charged against the defendant was "calculated to prejudice the public." *Radovich* v. *National Football League*, 231 F. 2d 620, 622-623. In doing so, the Court emphasized that the Sherman Act "is its own measure of right and wrong." 352 U.S. at 454.

[6] It is difficult to perceive how or at what point the lower court would determine that the elimination of individual entrepreneurs had passed permissible bounds. The court has failed to recognize that the sum-total effect of the elimination of a number of individual traders as a result of many diverse restraints is not negligible from the standpoint of public injury, even if in each case the public may patronize numerous other traders. In our view, the result of such eliminations would be a most serious encroachment on that optimum economic environment at which the Sherman Act aims. See *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4-5.

v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 210. But the injury to the public in terms of market control would certainly be no greater in that instance than that caused by the restraints here alleged, which were deliberately aimed at complete elimination of petitioner's competition;[7] in both instances, the public could still turn to the same large number of other retail outlets. Although both types of restraints would have the same "pernicious effect" and "lack of any redeeming virtue" (*Northern Pacific Ry. Co.* v. *United States, supra*, 356 U.S. at 5), the lower court would strike down the one and exempt the other.

Applying the correct standard to the facts of the instant case, petitioner's complaint, we believe, clearly stated a cause of action under the Sherman Act. Allegations not contested in the respondents' motion for summary judgment show a scheme whereby Hale, using its "strategic position" (*United States* v. *Griffith*, 334 U.S. 100, 107) as the operator of a chain of key stores on the Pacific coast, has coerced distributors and manufacturers into cutting off supplies to petitioner, its Mission Street rival.[8] Hale does not offer any "legitimate business aims" (*Times-Picayune, supra*,

[7] As stated in *Binderup* v. *Pathe Exchange, supra*, at 312, "[i]t is difficult to imagine how interstate trade could be more effectively restrained than by suppressing it * * *."

[8] Respondent Hale's scheme is analogous to resale price maintenance schemes enforced by refusals to sell to price-cutters. While the simple act of refusing to sell to any particular customer may be perfectly lawful (*United States* v. *Colgate & Co.*, 250 U.S. 300), a resale price maintenance scheme enforced by refusals to deal with non-cooperating retailers is unlawful. *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441; Barber, *Refusals to Deal under the Antitrust Laws*, 103 U. of Pa. L. Rev. 847, 851-862.

345 U.S. at 622) in justification. In the present posture of the case, its purpose stands admitted as one to stifle a competitor—"the very type of thing the Sherman Act condemns," *Northern Pacific Ry. Co.* v. *United States, supra,* 356 U.S. at 8. If the trial should establish the "forbidden end" (*Times-Picayune,* 345 U.S. at 622) of stifling competition, the instant restraint will have been shown to be unreasonable on its face. See *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U.S. 457, 465; *Associated Press* v. *United States,* 326 U.S. 1.

Furthermore, the complaint alleges that respondents have conspired "together, and each with the other" (R. 9) to refuse to sell products to petitioner. This Court has frequently stated that a concerted refusal to deal is *per se* illegal. See, e.g. *Northern Pacific Ry. Co.* v. *United States, supra,* 356 U.S. at 5; *United States* v. *Columbia Steel Co., supra,* 334 U.S. at 522-23; *Times-Picayune Publishing Co.* v. *United States, supra,* 345 U.S. at 625; *Fashion Originators' Guild* v. *Federal Trade Commission, supra.* This is most particularly so where the purpose of the threat or refusal is to coerce or destroy an enterprise engaged in competition with some or all of the conspirators. Barber, *Refusals to Deal under the Antitrust Laws,* 103 U. of Pa. L. Rev. 847, 872-879.

CONCLUSION

Since we are of the view that the decision below conflicts with decisions of this Court, that it embraces an interpretation of the Sherman Act which greatly narrows the measure of protection afforded the individual trader, and that it seriously limits the availability of

the treble damage remedy to the trader who is the victim of boycott and similar tactics, we believe that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 1958.

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